

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C 13-1605 SC

KARTHIK SUBRAMANI,

Plaintiff,

v.

WELLS FARGO BANK N.A., FIDELITY
NATIONAL TITLE COMPANY, and DOES
1-100,

Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS

I. INTRODUCTION

1 **II. BACKGROUND**

2 This action arises from a \$479,600 mortgage loan (the "Loan")
3 obtained by Plaintiff from Defendant on October 18, 2006, recorded
4 by an adjustable-rate promissory note and secured by a deed of
5 trust ("DOT") against residential real property in Livermore,
6 California. Compl. ¶¶ 10-11, Ex. A ("DOT"). The DOT states that
7 Plaintiff agreed to repay the borrowed \$479,600 or risk
8 foreclosure, and that "[t]he Note or a partial interest in the note
9 (together with this Security Instrument) can be sold one or more
10 times without prior notice to [Plaintiff]." Id. at 11 ¶ 20.
11 Defendant was the original lender under the DOT, and Fidelity
12 National Title Insurance Company ("FNTIC") -- purportedly not the
13 same entity as the non-appearing defendant FNTC -- was the original
14 trustee.

15 Plaintiff alleges that Defendant first sold the Loan to Wells
16 Fargo Asset Securities Corporation ("WFASC") sometime around
17 October 24, 2006. Soon after that, WFASC allegedly bundled
18 Plaintiff's Loan (consisting of the note and DOT) with other
19 mortgages into a mortgage-backed securities pool, the Wells Fargo
20 Mortgaged Backed Securities 2006-AR18 Trust, Mortgage Pass-Through
21 Certificates, Series 2006-AR18 (the "WFMBBS 2006-AR18 Trust"). Id.
22 ¶ 5. The WFMBBS 2006-AR18 Trust had been established on October 1,
23 2006 with the execution of a pooling and servicing agreement
24 ("PSA"). Id. ¶ 15. According to Plaintiff, one effect of the PSA
25 was to prohibit assignment of the DOT and note before the trust's
26 "Closing Date" of October 24, 2006. See id. ¶ 23.

27 On July 23, 2009, Plaintiff received a notice of default
28 ("NOD") from First American Title Insurance Company acting as an

1 agent for First American Loanstar Trustee Services ("First American
2 Loanstar") as purported "Agent for the Current Beneficiary."
3 Compl. Ex. B ("NOD 1"). According to Plaintiff, statements
4 associated with that NOD suggested without stating that Defendant
5 was the "current beneficiary" of the Loan. See Compl. ¶ 19.

6 On August 25, 2009, First American Loanstar, acting as
7 "attorney in fact for [Defendant]," issued a Substitution of
8 Trustee ("SOT 1"), substituting itself as trustee. Id. ¶ 23, Ex. C
9 (SOT).

10 Plaintiff's first NOD was rescinded on September 10, 2010, id.
11 Ex. D ("Rescission of NOD 1"), but Plaintiff defaulted again and a
12 second NOD was recorded on May 10, 2011, id. Ex. E ("NOD 2"). The
13 second NOD was issued on May 4, 2011, by LSI Title Company acting
14 as agent for FNTC. According to Plaintiff, the second NOD stated
15 that Defendant was the original beneficiary under the DOT, but did
16 not state who the current beneficiary was. See id. ¶ 27.

17 On May 6, 2011, between the issuance and recordation of the
18 second NOD, Defendant issued a second Substitution of Trustee ("SOT
19 2") appointing FNTC as substitute in place of FNTIC as trustee
20 under the DOT. Id. Ex. F (SOT 2). Three months later, on August
21 11, 2011, the second SOT was recorded. Id. ¶ 31.

22 Plaintiff did not cure his second default, and on August 11,
23 2011 -- the same day the second SOT was recorded -- FNTC, acting as
24 trustee under the DOT, issued and caused recording of the Notice of
25 Trustee Sale. Id. Ex. G ("NOTS"). A year later, on August 9,
26 2012, FNTC sold Plaintiff's Property in a foreclosure sale to non-
27 party California Equity Management Group, Inc., and issued the
28 Trustee's Deed Upon Sale ("TDUS") on August 15, 2012. Id. Ex. H.

Plaintiff contends that all of the legal documents described above were void because Defendant was no longer the valid lender in the DOT, or even an agent of a successor beneficiary after it sold the Loan in 2006. See id. ¶¶ 22-23. According to Plaintiff, Defendant did not assign the DOT or endorse the note pursuant to the PSA. See id. at 3-4 ¶¶ 4-6. Nor did Defendant abide by California law regarding the endorsement, assignment, and recordation of notes and DOTs. See id. ¶ 14. Plaintiff therefore states that after Defendant sold the Loan, neither Defendant nor anyone else had any right to or interest in the Loan, so all legal notices associated with the note and DOT -- including the SOTs, NODs, and the foreclosure sale itself -- are illegal and void.

On these facts, Plaintiff asserts eight causes of action: (1) wrongful foreclosure; (2) constructive fraud; (3) cancellation of fraudulent instruments; (4) violation of California's nonjudicial foreclosure statute, Cal. Civ. Code § 2934a(a)(1)(A); (5) unjust enrichment; (6) violation of the federal Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601 et seq.; (7) violation of California's Unfair Competition Law ("UCL"), Bus. & Prof. Code Section 17200; and (8) declaratory relief. Defendant now moves to dismiss.

III. LEGAL STANDARD

A. Motions to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."

1 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
2 1988). "When there are well-pleaded factual allegations, a court
3 should assume their veracity and then determine whether they
4 plausibly give rise to an entitlement to relief." Ashcroft v.
5 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
6 must accept as true all of the allegations contained in a complaint
7 is inapplicable to legal conclusions. Threadbare recitals of the
8 elements of a cause of action, supported by mere conclusory
9 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
11 complaint must be both "sufficiently detailed to give fair notice
12 to the opposing party of the nature of the claim so that the party
13 may effectively defend against it" and "sufficiently plausible"
14 such that "it is not unfair to require the opposing party to be
15 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
16 1202, 1216 (9th Cir. 2011).

17 On a motion to dismiss pursuant to Rule 12(b)(6), a district
18 court may "consider unattached evidence on which the complaint
19 'necessarily relies' if: (1) the complaint refers to the document
20 [and the document] is central to the plaintiff's claim; and (3) no
21 party questions the authenticity of the document." United States
22 v. Corinthian Colleges, 655 F.3d 984, 999 (9th Cir. 2011).

23 If the Court dismisses the complaint, it must then decide
24 whether to grant leave to amend. The Ninth Circuit has "repeatedly
25 held that a district court should grant leave to amend even if no
26 request to amend the pleading was made, unless it determines that
27 the pleading could not possibly be cured by the allegation of other
28 facts." Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)

(citations and internal quotation marks omitted).

B. Rule 9(b)

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks and citations omitted).

IV. DISCUSSION

A. Wrongful Foreclosure

Plaintiff alleges that Defendant wrongfully foreclosed on the Property, because the chain of title was broken when Defendant sold its interests in the Loan. Defendant moves to dismiss this claim for the reasons discussed below.

Defendant's primary argument -- that Plaintiff is claiming that securitization itself invalidates the initiation of foreclosure proceedings -- subtly misconstrues Plaintiff's complaint. See MTD at 5-6. Plaintiff's point is that it was Defendant's flawed procedures in attempting to securitize the loan that broke the chain of title on which Defendant relied. To be clear, Plaintiff is not simply alleging that assignment of the Loan to a trust pool provides standing to challenge the securitization.

1 That argument has been roundly dismissed in this Court. See, e.g.,
2 Flores v. GMAC Mortg., LLC, No. C 12-794 SI, 2013 WL 2049388, at *2
3 (N.D. Cal. May 14, 2013) (listing cases) Niranjan v. Bank of
4 America, N.A., No. 12-05706 WHA, 2013 WL 1701602, at *2 (N.D. CAL.
5 Apr. 18, 2013) (same). Plaintiff brings a variety of other claims
6 that are subtly different: Defendant's transfers are void because
7 Defendant did not assign the DOT or endorse the note in accordance
8 with California law; Defendant tried to transfer the Loan after the
9 PSA's October 24, 2012 deadline; and Defendant did not even assign
10 the Loan or the trusteeship to the correct parties.

11 To the extent Plaintiff relies on violations of the PSA or any
12 other agreements among third parties, Plaintiff's claim fails. As
13 this Court has often explained, plaintiffs who are not parties to
14 PSAs lack standing to challenge that aspect of the securitization
15 process's validity. See Almutarreb v. Bank of N.Y. Trust Co.,
16 N.A., No. C-12-3061 EMC, 2012 WL 4371410, at *2 (N.D. Cal. Sept.
17 24, 2012). On this point, Plaintiff contends that a recent
18 California Court of Appeals case, Glaski v. Bank of America, N.A.,
19 218 Cal. App. 4th 1079 (Cal. Ct. App. 2013), in which the court
20 held that under New York law, a securitized mortgage trustee's
21 acceptance of a loan after the trust's closing date would be void
22 in contravention of the trust document and would jeopardize the
23 trust's special tax status, id. at 1094-95. Defendant counters
24 that the Court should ignore Glaski as stating the minority rule.
25 Defendant urges the Court to follow Jenkins v. JP Morgan Chase
26 Bank, N.A., 216 Cal. App. 4th 497 (Cal. Ct. App. 2013). Jenkins
27 held that an unrelated third party to an alleged securitization
28 lacked standing to enforce any agreements (like a PSA) relating to

1 such transactions, and that the third party could not have been a
2 victim to any invalid transfer because her obligations under the
3 note never changed. Id. at 515-16. On this point, absent guidance
4 from the Ninth Circuit or the California Supreme Court, the Court
5 follows Jenkins, which appears to state the majority rule. See
6 Newman v. Bank of N.Y. Mellon, No. 1:12-CV-1629 AWI GSA, 2013 WL
7 5603316, at *3 n.2 (E.D. Cal. Oct. 11, 2013) ("Glaski is in a clear
8 minority" on this issue); Diunugala v. J.P. Morgan Chase Bank,
9 N.A., No. 12-cv-2106-WQH-NLS, 2013 WL 5568737, at *8 (S.D. Cal.
10 Oct. 3, 2013) (stating same). Accordingly, the Court DISMISSES
11 Plaintiff's wrongful foreclosure claim to the extent that it is
12 predicated on Defendant's alleged violation of the PSA or any other
13 third-party agreements related to the Loan's securitization.

14 However, the Court finds that at the 12(b)(6) stage, Plaintiff
15 has sufficiently stated a claim for wrongful foreclosure based on
16 his allegations that Defendant's 2006 sale of Plaintiff's DOT
17 precluded Defendant from retaining a beneficial interest in the
18 DOT. See Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 975
19 (N.D. Cal. 2012). Plaintiff has sufficiently alleged that
20 Defendant directed the wrong party to issue Notices of Default,
21 that Defendant is not the true beneficiary, and that Defendant
22 failed to abide by the rules regarding transference of the Loan.
23 All of these allegations are supported by specific enough facts to
24 state a plausible claim at this point. This case is not like the
25 cases Defendant cites, in which the plaintiffs rely solely on
26 violations of a PSA or securitization in itself. See MTD at 5-6
27 (citing cases). Defendant's motion to dismiss on these grounds is
28 DENIED. Defendant may, of course, raise this issue again in a

1 later motion.

2 Defendant also argues that tender is required to challenge a
3 foreclosure sale or quiet title. Since Plaintiff failed to tender
4 the amount of secured indebtedness in this case, Defendant contends
5 that the case should be dismissed. MTD at 4-7. Plaintiff responds
6 that California law does not require tender if he alleges that
7 Defendant's title is void, as he has in this case. Opp'n at 8.

8 Generally, the "tender rule" applies to claims to set aside a
9 trustee's sale for procedural irregularities or alleged
10 deficiencies in the sale notice. See Lester v. J.P. Morgan Chase
11 Bank, N.A., 926 F. Supp. 2d 1081, 1092 (N.D. Cal. 2013). "[T]he
12 rationale behind the rule is that if plaintiffs could not have
13 redeemed the property had the sale procedures been proper, any
14 irregularities in the sale did not result in damages to the
15 plaintiffs." Id. (internal citations and quotations omitted).
16 However, tender may not be required where doing so would be
17 inequitable. Onofrio v. Rice, 55 Cal. App. 4th 413, 424 (Cal. Ct.
18 App. 1997). Courts have found exceptions to the tender rule if "a
19 sale is void, rather than simply voidable," as when an incorrect
20 trustee forecloses on a property. See Tamburri v. Suntrust Mortg.,
21 No. C-11-2899 EMC, 2011 WL 6294472, at *4 (N.D. Cal. Dec. 15, 2011)
22 (citing Dimock v. Emerald Properties LLC, 81 Cal. App. 4th 868, 876
23 (Cal. Ct. App. 2000)). Under these circumstances, since Plaintiff
24 has sufficiently alleged that the foreclosure sale was void, Compl.
25 ¶¶ 81-85, the Court declines to dismiss the complaint based on
26 Plaintiff's failure to allege tender.

27 Defendant also contends that Gomes v. Countrywide Home Loan,
28 Inc., 192 Cal. App. 4th 1149 (Cal. Ct. App. 2011), requires the

1 Court to dismiss Plaintiff's challenges to the foreclosure. MTD at
2 7-8. In Gomes, the California Court of Appeals held that
3 California Civil Code § 2924(a)(1) does not "provide for a judicial
4 action to determine whether the person initiating the foreclosure
5 process is indeed authorized." Id. at 1155.

6 Gomes is inapposite. It involved whether the party selling
7 the foreclosed property was authorized to do so by the owner of the
8 promissory note, not whether there was some infirmity in the
9 assignment process leading to wrongful foreclosure. Id. In this
10 case, Plaintiff does not seek a determination of whether Defendant
11 may foreclose. He alleges that it cannot and provides factual
12 support for this contention. See Lester, 926 F. Supp. 2d at 1092.
13 The Court therefore finds that Gomes does not preclude Plaintiff
14 from challenging Defendant's standing to foreclose.

15 Accordingly, Plaintiff's wrongful foreclosure claim survives
16 except to the extent that it is based on Defendant's alleged
17 violation of the PSA.

18 **B. Cancellation of Fraudulent Instruments**

19 California Civil Code section 3412 provides that a "written
20 instrument, in respect to which there is a reasonable apprehension
21 that if left outstanding it may cause serious injury to a person
22 against whom it is void or voidable, may, on that person's
23 application, be so adjudged and ordered to be delivered up or
24 canceled."

25 Plaintiff contends that the legal documents at issue in this
26 case -- the SOTs, the TDUS, as well as the DOT -- are void for the
27 reasons explained above. Compl. ¶¶ 99-101. Defendant argues, as
28 it did under Plaintiff's wrongful foreclosure claim, that because

1 those claims are based on the Loan securitization and the
2 foreclosing beneficiary's standing to commence foreclosure, this
3 cause of action must fail. MTD at 9. As discussed above, the
4 Court rejects Defendant's arguments and declines to dismiss
5 Plaintiff's Section 3412 claim on those grounds.

6 However, since Defendant is correct that California Civil Code
7 section 2932.5 does not apply to deeds of trust -- only to
8 mortgages -- Plaintiff's claim is dismissed to the extent that it
9 relies on a violation of Civil Code section 2932.5. Calvo v. HSBC
10 Bank USA, N.A. 199 Cal. App. 4th 118, 123 (Cal. Ct. App. 2011) ("It
11 is well established that section 2932.5 does not apply to trust
12 deeds, in which the power of sale is granted to a third party, the
13 trustee . . . Section 2932.5 applies to mortgages, in which the
14 mortgagor or borrower has granted a power of sale to the mortgagee
15 or lender.")

16 **C. Constructive Fraud**

17 To state a prima facie claim for constructive fraud, a
18 plaintiff must allege (1) a fiduciary or confidential relationship;
19 (2) an act, omission or concealment involving a breach of that
20 duty; (3) reliance; and (4) resulting damage. Assilzadeh v. Cal.
21 Fed. Bank, 82 Cal. App. 4th 399, 414 (Cal. Ct. App. 2000).

22 Plaintiff alleges that because Defendant knew it had no beneficial
23 interest in the Loan after its sale in October 2006, Defendant's
24 post-sale behavior toward Plaintiff -- including taking payments on
25 the Loan and not revealing to Plaintiff that Defendant was going to
26 take out insurance and obtain Temporary Asset Relief Program
27 ("TARP") funds based on the Loan -- was fraudulent. See Compl.
28 ¶¶ 91-97. Plaintiff also appears to contend that some of the

1 documents, at least the NOD, were forgeries. Id.

2 Defendant argues that Plaintiff's fraud claim fails primarily
3 because Plaintiff fails to allege a fiduciary relationship between
4 himself and Defendant, and that Plaintiff could not do so as a
5 matter of law, since Defendant was proceeding in the capacity of an
6 ordinarily lender of money and therefore was not in a fiduciary
7 relationship with Plaintiff. MTD at 10-11 (citing Mangindin v.
8 Wash. Mut. Bank, 637 F. Supp. 2d 700, 710 (N.D. Cal. 2009)).

9 Defendant also contends that Plaintiff fails to plead fraud with
10 particularity. Id. at 11. Plaintiff does not join these
11 arguments, requesting only that he be given leave to amend his
12 complaint to allege justifiable reliance based on Glaski. Opp'n at
13 8.

14 Defendant is correct on all points. First, Plaintiff's fraud
15 claim mixes theories, factual allegations, and outright legal
16 conclusions in a way that makes it impossible for the Court to find
17 Plaintiff's claims plausible and specific. This fails to meet the
18 standards of Rules 8 and 9(b), which require only that Plaintiff
19 lay out the "who, what, when, where, and how" of his fraud claim in
20 a way that is minimally plausible.

21 Second, Plaintiff fails to allege a fiduciary relationship
22 anywhere in his complaint, and without that necessary element,
23 Plaintiff's constructive fraud claim fails as a matter of law. In
24 any event, under California law, "a financial institution owes no
25 duty of care to a borrower when the institution's involvement in
26 the loan transaction does not exceed the scope of its conventional
27 role as a mere lender of money," and commercial lenders "[are]
28 entitled to pursue [their] own economic interests in a loan

1 transaction." Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal.
2 App. 3d 1089, 1095-96 & 1093 n.1 (Cal. Ct. App. 1991) (citations
3 omitted). In California, the test for determining whether a
4 financial institution exceeded its role as money lender and thus
5 owes a duty of care to a borrower-client involves "the balancing of
6 various factors, among which are (1) the extent to which the
7 transaction was intended to affect the plaintiff, (2) the
8 foreseeability of harm to him, (3) the degree of certainty that the
9 plaintiff suffered injury, (4) the closeness of the connection
10 between the defendant's conduct and the injury suffered, (5) the
11 moral blame attached to the defendant's conduct, and (6) the policy
12 of preventing future harm." Heritage Oaks Partners v. First Am.
13 Title Ins. Co., 155 Cal. App. 4th 339, 345 (Cal. Ct. App. 2007).

14 Neither party addresses these matters. The Court finds that
15 the face of the complaint does not establish that Defendant has
16 exceeded its role as money lender and would therefore owe a duty of
17 care to Plaintiff. The Court therefore does not find that
18 Defendant's activities fall outside the Nymark rule. Accordingly,
19 the Court DISMISSES Plaintiff's constructive fraud claim with leave
20 to amend, provided that Plaintiff take careful note of the
21 guidelines above.

22 **D. California Civil Code Section 2934a(a)(1)(A)**

23 Plaintiff asserts a claim against Defendant under California
24 Civil Code section 2934a(a)(1)(A), which provides that all
25 beneficiaries to a DOT must execute and record Substitutions of
26 Trustee if those instruments are to be effective -- otherwise the
27 substitution will be void. Plaintiff alleges that the trustee sale
28 referenced above is void under California law, because no

beneficiary effectively executed or recorded a Substitution of Trustee. Compl. ¶¶ 106-08. Defendant argues that Plaintiff agreed, in executing the DOT, that Defendant could appoint successor trustees, and that on August 11, 2011, Defendant caused to be recorded a duly executed and acknowledged Substitution of Trustee. ECF No. 26 ("Def.'s RJN) Ex. E.¹ Defendant is correct. Plaintiff may have alleged that the SOTs were void, but Defendant did not breach the procedural requirements of the Civil Code. This claim is DISMISSED WITH PREJUDICE.

E. Unjust Enrichment

Plaintiff asserts an unjust enrichment claim against Defendant on the theory that Defendant accepted loan payments to which it was not entitled. Defendant argues that unjust enrichment is not a cause of action in California, and that in any event, Plaintiff agreed to repay the money it borrowed, so Plaintiff fails to state a claim based on Defendant's receipt of money it was not owed. MTD at 12-13.

California courts split on whether or not quasi contract is an independent claim for relief. Compare Davenport v. Litton Loan Servicing, LP, 725 F. Supp. 2d 862, 885 (N.D. Cal. 2010) (suggesting quasi contract can be its own basis for relief) with Bernardi v. JPMorgan Chase Bank, N.A., No. 5:11-cv-04212 EJD, 2012 WL 2343679, at *3 (N.D. Cal. June 20, 2012) (holding unjust enrichment is not an independent claim for relief). In this case, because Plaintiff argues that it would be unjust to allow Defendant to retain money procured through fraudulent or unenforceable

¹ The Court GRANTS Defendant's unopposed request for judicial notice under Federal Rule of Evidence 201.

1 documents, the Court finds it equitable to allow Plaintiff's unjust
2 enrichment claim to stand on its own. See Davenport, 725 F. Supp.
3 2d at 885.

4 Defendant's second argument -- that Plaintiff agreed to repay
5 money it borrowed and therefore cannot contend that Defendant
6 retained money unjustly -- ignores the fact that Plaintiff's claim
7 is based on his allegation that the relevant contract is void.
8 Defendant's motion to dismiss on this ground is DENIED.
9 Plaintiff's unjust enrichment claim survives.

10 **F. UCL**

11 The UCL prohibits unfair competition, which is defined as "any
12 unlawful, unfair or fraudulent business act or practice." Cal.
13 Bus. & Prof. Code § 17200. Each one of these prongs is a different
14 cause of action. Cel-Tech Comm'cns, Inc. v. L.A. Cellular Tel.
15 Co., 20 Cal. 4th 163, 180 (Cal. 1999). Plaintiff does not specify
16 under which prong he brings this claim, other than the fraudulent
17 prong, and much of this claim does not actually map to what
18 Plaintiff pled. See Compl. ¶¶ 121. Despite this failing, the
19 Court finds that Plaintiff has adequately pled a UCL fraud claim,
20 based on his allegation that Defendant's behavior, described above,
21 is likely to deceive consumers. See id. ¶¶ 119-121.

22 Without addressing fraud, the sole UCL claim Plaintiff has
23 specifically pled, Defendant moves to dismiss this cause of action,
24 arguing that the UCL requires a predicate legal violation and that
25 Plaintiff has failed to plead damages. See MTD at 15. Defendant
26 is wrong. First, Plaintiff has adequately pled predicate causes of
27 action -- which are not necessarily required, except so far as the
28 unlawfulness prong borrows from violations of other laws, see Cel-

1 Tech, 20 Cal. 4th at 180 -- and second, Plaintiff adequately
2 alleged damages, as discussed above.

3 Plaintiff's UCL fraud claim survives, but Plaintiff's other
4 UCL claims are DISMISSED without prejudice. They are inadequately
5 pled, but Plaintiff has leave to amend his UCL claim in order to
6 explain how or whether Defendant violated the UCL unfairness or
7 unlawfulness prongs. The Court finds that Plaintiff's references
8 to the Unfair Practices Act ("UPA"), Cal. Bus. & Prof. Code § 17000
9 et seq., in his UCL claim are impermissibly vague and conclusory.
10 If Plaintiff chooses to re-allege any violations of the UPA, he
11 must do so in accordance with Rule 8.

12 **G. TILA**

13 Plaintiff alleges a TILA violation against Defendant for
14 failing to record documents reflecting any defendant as a lawful
15 lender, rendering the NODs and foreclosure sale fraudulent,
16 defective, and void. Compl. ¶¶ 112-115. TILA was enacted to
17 ensure "a meaningful disclosure of credit terms so that the
18 consumer will be able to compare more readily the various credit
19 terms available to him and avoid the uninformed use of credit, and
20 to protect the consumer against inaccurate and unfair credit
21 billing and credit card practices." 15 U.S.C. § 1601(a). See also
22 King v. California, 784 F.2d 910, 915 (9th Cir. 1986); Hubbard v.
23 Fid. Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996).

24 Defendant moves to dismiss Plaintiff's TILA claim on three
25 grounds: first, that the claim is time-barred because TILA has a
26 one-year limitations period accruing upon consummation of the loan;
27 second, that the claim does not allege specific facts that could
28 support recovery; and third, that Plaintiff's allegations about the

1 Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et
2 seq., are inapposite because Defendant is not a debt collector, and
3 foreclosure pursuant to a DOT is not collection of a debt per the
4 FDCPA. MTD at 13-14.

5 The Court finds for Defendant on all grounds. Plaintiff does
6 not join any of these arguments in his opposition brief, but
7 regardless, Plaintiff filed his complaint seven years after the
8 Loan documents were executed, so the claim is time-barred. 15
9 U.S.C. § 1640(e). Further, Plaintiff's TILA claim fails to plead
10 specific, plausible facts as to how Defendant violated TILA. See
11 Comp. ¶¶ 112-15. Finally, as Defendant notes, foreclosure under a
12 DOT is not debt collection per the FDCPA. See, e.g., Garcia v. Am.
13 Home Mortg. Serv., Inc., No. 11-CV-03678-LHK, 2011 WL 6141047, at
14 *4 (N.D. Cal. Dec. 9, 2011) ("non-judicial foreclosure does not
15 constitute 'debt collection' as defined by the [FDCPA]"); Garfinkle
16 v. JPMorgan Chase Bank, N.A., No. C 11-01636 CW, 2011 WL 3157157,
17 at *3 (N.D. Cal. July 26, 2011) (collecting cases).

18 Plaintiff's TILA claim is DISMISSED with leave to amend, so
19 that Plaintiff can explain how (if so) his TILA claim's statute of
20 limitations is tolled. King, 784 F.2d at 915 (equitable tolling of
21 civil damages claims brought under TILA may, in the appropriate
22 circumstances, suspend the limitations period until the borrower
23 discovers or had reasonable opportunity to discover the fraud or
24 nondisclosures that form the basis of the TILA action). Plaintiff
25 may not reassert a TILA claim that depends on the FDCPA. That
26 portion of the claim is DISMISSED WITH PREJUDICE.

27 ///

28 ///

1 **H. Declaratory Relief**

2 Plaintiff seeks declaratory relief under California Code of
3 Civil Procedure section 1060, in order to decide the rights and
4 interests of Plaintiff and Defendant and to issue an injunction as
5 to Defendant's behavior. Compl. ¶¶ 132-37. This claim lacks
6 specificity, and in any event, declaratory relief is a remedy, not
7 a cause of action. This claim is DISMISSED WITH PREJUDICE.

8
9 **V. CONCLUSION**

10 As explained above, the Court GRANTS in part and DENIES in
11 part Defendant Wells Fargo Bank N.A.'s motion to dismiss Plaintiff
12 Karthik Subramani's first amended complaint. The Court orders as
13 follows:

- 14 (1) Plaintiff's wrongful foreclosure claim is undisturbed.
15 (2) Plaintiff's constructive fraud claim is DISMISSED with
16 leave to amend.
17 (3) Plaintiff's cancellation of fraudulent instruments claim
18 is undisturbed.
19 (4) Plaintiff's claim under California Civil Code section
20 2934a(a)(1)(A) is DISMISSED WITH PREJUDICE.
21 (5) Plaintiff's unjust enrichment claim is undisturbed.
22 (6) Plaintiff's TILA claim is DISMISSED with leave to amend.
23 (7) Plaintiff's UCL fraud claim is undisturbed, but his
24 claims under the unfair and unlawful prongs of the UCL
25 are DISMISSED with leave to amend.
26 (8) Plaintiff's declaratory relief claim is DISMISSED WITH
27 PREJUDICE.

28 ///

1 Plaintiff is on notice that any amended pleading must comport
2 with Rules 8 and 9(b).

3
4 IT IS SO ORDERED.

5
6 Dated: October 30, 2013



UNITED STATES DISTRICT JUDGE